



March 27, 2001

Mr. Gary Allmon Grimes
Schuerenberg & Grimes
Well Fargo Bank Building
120 West Main, Suite 201
Mesquite, Texas 75149

OR2001-1204

Dear Mr. Grimes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145304.

The Mesquite Independent School District (the "district"), which you represent, received a request for information concerning district employees. You claim that portions of the requested information are excepted from disclosure by section 552.102(a) of the Government Code and other portions may be excepted under section 552.117 of the Government Code. We have reviewed the submitted information.¹

We first note that the request for information is dated "5/4/00" and bears the FAX transmission date of "05-05-00." The district's request for opinion regarding this request for information is dated "January 17, 2001" and was received by this office on January 22, 2001. Subsections 552.301(a) and (b) of the Government Code provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You did not request a decision from this office within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, and must be released, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). A compelling reason is demonstrated where information is made confidential by other law, or where third party interests are at issue. Open Record Decision No. 150 (1977). As the exceptions you raise protect the interest of third parties and information that is confidential, we shall address those exceptions. The submitted materials also include information that is not subject to the Public Information Act.

Exhibits K and P consist of medical records subject to chapter 159 of the Occupations Code, the Medical Practice Act ("MPA"), rather than the Public Information Act. *See* Open Records Decision No. 598 (1991). Section 159.002 of the MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). The MPA provides specific release provisions. *See* Occ. Code §§ 159.004(5), 159.005(1) (providing that otherwise confidential medical information may be released to a person who bears a written consent of the patient, subject to certain requirements). You may release records such as those submitted as exhibits K and P only in accordance with the MPA.

You contend that release of a portion of the responsive information “would constitute a clearly unwarranted invasion of personal privacy.” Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. This section encompasses the common law right to privacy. Section 552.102(a) of the Government Code, protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref’d n.r.e.). Information may be withheld from the public under the common-law right of privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). Personal data sheets making beneficiary designations, such as those submitted in exhibit E, and criminal background investigation materials, such as those submitted in exhibit S, are protected by the common law right of privacy *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (compilation of individual’s criminal history information by governmental implicates the individual’s right to privacy); *See also* Open Records Decision Nos. 616 (1993), 565 (1990). We have marked the information submitted in exhibits E and S, that is protected by the common law right of privacy. This information must be withheld under sections 552.101 and 552.102(a) of the Government Code.

Section 552.101 also encompasses information protected by other statutes. Section 21.355 of the Education Code makes documents that evaluate the performance of a teacher or administrator confidential. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). This office has also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* From our review of the documents submitted as exhibit T, we conclude that these materials are teacher evaluations made confidential by section 21.355 of the Education Code. This information must be withheld under section 552.101 of the Government Code.

Employee W-4 forms are made confidential by federal law and must also be withheld under section 552.101 of the Government Code. 26 USC §6103(a); Open Records Decision No. 600 (1992). The district must therefore withhold the information in exhibit H under section 552.101 of the Government Code.

Release of employment eligibility verification Form I-9, is governed by title 8, section 1324a of the United States Code, which provides that the form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing

crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under chapter 552 of the Government Code would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Government Code and may only be released in compliance with applicable federal statutes and regulations governing the employment eligibility system. The district must therefore withhold Forms I-9, such as that submitted in exhibit I, under section 552.101 of the Government Code.

Social security numbers may also be withheld in some circumstances under section 552.101 of the Government Code. A social security number or “related record” may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the records here are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990.

Section 552.102(b) of the Government Code excepts from public disclosure information, other than the curriculum and the degree obtained, in transcripts from an institution of higher education in records maintained in the personnel file of a professional public school employee. The information submitted as exhibit D is such a transcript. Only the curriculum and degree obtained may be released from such documents. The remaining transcript information must be withheld under section 552.102(b) of the Government Code.

Section 552.117(1) of the Government Code excepts from disclosure information that relates to the home addresses, home telephone numbers, social security numbers, and family member information of current or former employees of a governmental body who request that this information remain confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, if a current or former employee did not elect to keep his home addresses, telephone numbers, social security number, or family member information confidential under section 552.024 before the request was received, this information may not be withheld from public disclosure under section 552.117(1) of the Government Code.

You indicate that two elections for non-disclosure were made before the subject request for information was received. You include an affidavit which attests that one of these elections was timely submitted but lost and resubmitted. We conclude from your representations that you have determined that both of these elections were submitted before the request for

information was received. Therefore, the personal information of the employees identified in exhibits U and W must be withheld. If the maiden name of either of these individuals appears on an application or other form, that name must be redacted, since it would reveal that the individual has family members. Also note that parents' names appearing on birth certificates are subject to section 552.117. You indicate that the employees identified in exhibit V did not elect non-disclosure before the request for information was received. The personal information of the employees identified in exhibit V must therefore be released to this requestor.

Release of Texas drivers' license information is governed by section 552.130(a)(1) of the Government Code. This section excepts from required public disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration, issued by an agency of this state. You must withhold Texas drivers' license numbers and photocopies of Texas drivers' licenses, such as that submitted in exhibit I, under section 552.130(a)(1) of the Government Code.

In summary, you must withhold: personal data sheets with beneficiary designations, such as those submitted in exhibit E; criminal history compilations, such as criminal background investigations submitted in exhibit S; teacher evaluations such as those submitted in exhibit T; transcript information, other than degree obtained and curriculum, on documents such as that submitted in exhibit D; W-4 forms, such as that submitted in exhibit H; Forms I-9 and photocopies of Texas drivers' licenses such as those submitted in exhibit I; Texas drivers' license numbers; social security numbers obtained or maintained pursuant to any provision of law, enacted on or after October 1, 1990; and the home addresses, home telephone numbers, social security numbers, and family member information of the individuals identified in exhibits U and W. Medical records, such as those submitted in exhibits K and P, may only be released as provided by the Medical Practice Act. All other responsive information must be released to this requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

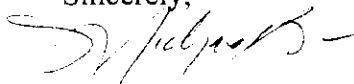
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 145304

Encl: Submitted documents

cc: Mr. J. Umoren
Box 270114
Dallas, Texas 75227
(w/o enclosures)